KABEER KATHER v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
ZAKARIA SAM JCA
AB KARIM AB JALIL JCA
[CRIMINAL APPEALS NO: B-05-45-02-2015 & B-05(SH)-329-12-2015]
23 NOVEMBER 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Dangerous drugs found in bag – Accused person originally charged for possession under s. 39B(1)(a) but reduced to s. 12(2) of Dangerous Drugs Act 1952 – Whether accused person only in passive possession – Accused person sentenced to 20 years imprisonment – Whether conviction and sentence safe*

CRIMINAL PROCEDURE: *Charge – Reduction of – Appeal by prosecution against reduction of charge – Dangerous drugs found in bag – Accused person originally charged for possession – Charge reduced from s. 39B(1)(a) to s. 12(2) of Dangerous Drugs Act 1952 – Whether accused person only in passive possession – Accused person sentenced to 20 years imprisonment – Whether sentence rightly reduced*

CRIMINAL LAW: *Dangerous drugs – Trafficking – Knowledge – Demeanour – Discovery of dangerous drugs hidden in bag – 3,217g ketamine hidden in secret compartment – Accused person calm and normal when apprehended – Whether signified lack of knowledge of drugs – Whether defence of innocent carrier available to accused person – Dangerous Drugs Act 1952, s. 39B(1)(a)*

Upon his arrival at the Kuala Lumpur International Airport, the appellant was stopped by the customs and the trolley bag ('P6') he was pulling was scanned. A suspicious image appeared and further inspection revealed a hidden compartment at the bottom of P6. Inside it was a transparent plastic bag containing crystal substances which were later confirmed by the chemist to be 3,217g of ketamine. The appellant was charged at the High Court for the offence of trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). At the close of the prosecution's case, the trial judge found that the appellant had direct and actual physical possession because P6 was locked with a padlock which was opened by a key held by the appellant. The trial judge referred to s. 2 of the DDA and made a finding of trafficking which included the act of carrying. However, His Lordship held that the prosecution failed to establish a *prima facie* case against the appellant by failing to prove the main ingredient of the charge due to breach of the drugs analysis protocol. The appellant was acquitted and discharged of the offence without being called to enter his defence. The prosecution succeeded in its appeal at the Court of Appeal against the said decision. The case was remitted back to the High Court and the appellant was ordered to enter his defence. In his defence, the appellant

A denied knowledge of the drugs. Having found that the prosecution failed to prove the original charge of trafficking, the trial judge made a finding of custody or control under s. 12(2) of the DDA. It was decided that only passive possession of the drugs was proven against the appellant as mere act of carrying did not amount to trafficking. His Lordship further found that the B calm and normal behaviour that the appellant displayed when he was apprehended showed his lack of knowledge of the drugs. The charge was reduced from s. 39B(1)(a) to s. 12(2) of the DDA. The appellant was found guilty and convicted for the reduced charge and sentenced to 20 years of imprisonment. Hence, the present appeal by the appellant against his C conviction and sentence on the grounds that (i) he had no knowledge of the drugs found in P6; and (ii) his conduct and the cooperation he gave throughout the investigation showed his innocence rather than guilt. The prosecution crossed-appeal against the decision of the High Court in reducing the charge.

D **Held (dismissing appellant's appeal; allowing prosecution's cross-appeal) Per Mohtarudin Baki JCA delivering the judgment of the court:**

(1) The issue of knowledge had already been dealt with when the Court of Appeal directed the appellant to enter his defence under the original charge for trafficking. The appellant could not exculpate his E involvement in the trafficking of the drugs by claiming that he had no knowledge or rather, an innocent carrier. Contention of no knowledge of the hidden drugs that the appellant himself had not seen was inherently incredible as the amount of drugs involved was rather big. The weight of 3,217g could be felt and would raise suspicion to any F reasonable person who carried a bag even if it was concealed at any part of the bag. (paras 20-21)

(2) The appellant's defence was a bare denial without any plausible explanation as to how the drugs were present in the hidden compartment of P6. Nowhere in his evidence did he state that he was forced to bring G P6 or that it was borrowed from someone else. The appellant only testified that he had no idea as to the presence of the drugs in P6 when he was arrested. A statement of this sort did not carry much weight to support the defence case. Even if the appellant's defence was accepted to be true, the principle of wilful blindness would operate against him. H The legal doctrine of 'if a person deliberately shuts his eye to the obvious because he doesn't want to know, he is taken to know' applied to the appellant's omission to check the contents of P6 prior to his trip. (paras 24 & 25)

(3) The evidence of conduct is not conclusive and should not be considered I in isolation to show a person's guilt or innocence. The appellant was surrounded by several customs officers when P6 was examined. Being a foreigner, the appellant had no choice but to follow their instructions and extend his cooperation. In any event, when the custody and control

is established, knowledge is presumed by s. 37(d) of the DDA. With reference to s. 2 of the DDA, the appellant's overt act of trafficking in the dangerous drugs was proven. (paras 27 & 28)

(4) Section 182A(1) of the Criminal Procedure Code requires the trial judge to not only consider the appellant's explanation but to also test it against the evidence established by the prosecution at the close of the prosecution's case. It was unbelievable that the appellant only had a passive possession of the drugs in P6 which subsequently entitled him to only be punished under s. 12(2) of the DDA. (para 30)

(5) The defence failed to rebut the presumption of knowledge under s. 37(d) of the DDA on the balance of probability and to cast a reasonable doubt on the *prima facie* case established against him for the offence of trafficking. The appellant's appeal against his conviction and sentence under s. 12(2) of the DDA was dismissed while the cross-appeal by the prosecution was allowed. The appellant's conviction under s. 12(2) was set aside and substituted with an order that the appellant be convicted for the same trafficking charge under s. 39B(1)(a) of the DDA. The appellant was sentenced to death by hanging. (para 31)

Bahasa Malaysia *Headnotes*

Setibanya di Lapangan Terbang Kuala Lumpur, perayu ditahan oleh pihak kastam dan beg beroda ('P6') yang dibawanya diimbas. Imej meragukan terpapar dan pemeriksaan lanjut mendedahkan ruang tersembunyi pada dasar P6. Di dalamnya terkandung beg plastik lut sinar berisi bahan kristal yang kemudian disahkan oleh ahli kimia sebagai 3,217g ketamin. Perayu dihadapkan ke Mahkamah Tinggi atas pertuduhan mengedar dadah berbahaya, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada penutup kes pendakwaan, hakim bicara mendapati perayu mempunyai milikan fizikal langsung dan sebenar kerana P6 dikunci dengan mangga yang dibuka oleh kunci yang dipegang oleh perayu. Hakim bicara merujuk kepada s. 2 ADB dan membuat dapatan pengedaran termasuk tindakan membawa. Walau bagaimanapun, beliau memutuskan pihak pendakwaan gagal membuktikan kes *prima facie* terhadap perayu kerana gagal membuktikan intipati utama pertuduhan akibat pelanggaran protokol analisis dadah. Perayu dilepaskan dan dibebaskan daripada pertuduhan tanpa dipanggil membela diri. Namun begitu, pihak pendakwaan berjaya dalam rayuannya terhadap keputusan tersebut di Mahkamah Rayuan. Kes ini dikembalikan ke Mahkamah Tinggi dan perayu diperintahkan membela diri. Dalam pembelaannya, perayu menafikan pengetahuan tentang dadah tersebut. Mendapati pihak pendakwaan gagal membuktikan pertuduhan asal iaitu pengedaran, hakim bicara membuat dapatan jagaan atau kawalan bawah s. 12(2) ADB. Diputuskan bahawa hanya milikan pasif dadah yang terbukti terhadap perayu kerana tindakan membawa tidak terangkum dalam pengedaran. Hakim bicara seterusnya mendapati perilaku perayu yang kelihatan tenang dan bersahaja ketika ditahan menunjukkan dia tidak

mempunyai pengetahuan tentang dadah tersebut. Pertuduhan dikurangkan daripada s. 39B(1)(a) menjadi s. 12(2) ADB. Perayu didapati bersalah dan disabitkan atas pertuduhan yang dikurangkan dan dijatuhkan hukuman 20 tahun penjara. Maka, timbul rayuan ini oleh perayu terhadap sabitan dan hukumannya atas alasan (i) dia tiada pengetahuan tentang dadah yang dijumpai di dalam P6; dan (ii) perilaku dan kerjasama yang diberi olehnya sepanjang siasatan mencerminkan ketidakbersalahan berbanding kebersalahan. Pihak pendakwaan merayu balas terhadap keputusan Mahkamah Tinggi yang mengurangkan pertuduhan.

Diputuskan (menolak rayuan perayu; membenarkan rayuan balas pihak pendakwaan)

Oleh Mohtarudin Baki HMR menyampaikan penghakiman mahkamah:

(1) Isu pengetahuan telah disentuh semasa Mahkamah Rayuan mengarahkan perayu membela diri atas pertuduhan asal mengedar. Perayu tidak boleh membebaskan diri daripada penglibatannya dalam pengedaran dadah dengan mendalihkan dia tiada pengetahuan atau bahawa dia seorang pembawa tidak bersalah. Dakwaan tiada pengetahuan tentang dadah yang disembunyikan yang perayu sendiri tidak lihat sangat sukar dipercayai kerana jumlah dadah terlibat agak besar. Jika pun tersembunyi pada mana-mana bahagian beg, berat 3,217g boleh dirasai dan akan membangkitkan syak wasangka mana-mana orang munasabah yang membawa beg tersebut.

(2) Pembelaan perayu adalah satu penafian semata-mata tanpa penjelasan munasabah tentang dadah yang dijumpai dalam ruang tersembunyi P6. Perayu langsung tidak menyatakan dalam mana-mana bahagian keterangannya bahawa dia dipaksa membawa P6 atau bahawa P6 dipinjam daripada orang lain. Perayu hanya memberi keterangan dia tidak tahu tentang kewujudan dadah tersebut dalam P6 semasa dia ditahan. Kenyataan begini tidak berat nilainya untuk menyokong kes pembelaan. Jika pun pembelaan perayu diterima sebagai benar, prinsip kesengajaan membuta terpakai padanya. Doktrin undang-undang 'seseorang dianggap tahu jika dia sengaja menutup mata terhadap perkara nyata kerana tidak ingin tahu', terpakai pada kealpaan perayu memeriksa kandungan P6 sebelum perjalanannya.

(3) Keterangan perilaku tidak muktamad dan tidak patut dipertimbangkan berasingan untuk membuktikan kebersalahan atau ketidakbersalahan seseorang. Perayu dikelilingi beberapa pegawai kastam ketika P6 diperiksa. Sebagai orang asing, perayu tiada pilihan melainkan mematuhi arahan mereka dan memberi kerjasama. Dalam apa jua keadaan, apabila jagaan dan kawalan berjaya dibuktikan, anggapan pengetahuan dibangkitkan oleh s. 37(d) ADB. Merujuk s. 2 ADB, tindakan perayu yang terang-terangan mengedar dadah telah terbukti.

(4) Seksyen 182A(1) Kanun Tatacara Jenayah mengkehendaki agar hakim bicara bukan sahaja mempertimbangkan penjelasan perayu tetapi juga mengujinya dengan keterangan yang dikemukakan oleh pihak pendakwaan semasa penutup kes pendakwaan. Sukar dipercayai perayu hanya mempunyai milikan pasif dadah di dalam P6 yang langsung melayakkannya dihukum bawah s. 12(2) ADB.

(5) Pembelaan gagal menyangkal anggapan pengetahuan bawah s. 37(d) ADB atas imbangan kebarangkalian dan gagal membangkitkan keraguan munasabah terhadap kes *prima facie* yang dibuktikan terhadapnya bagi kesalahan mengedar. Rayuan perayu terhadap sabitan dan hukumannya bawah s. 12(2) ADB ditolak manakala rayuan balas pihak pendakwaan dibenarkan. Sabitan perayu bawah s. 12(2) diketepikan dan diganti dengan perintah agar perayu disabitkan bagi pertuduhan mengedar bawah s. 39B(1)(a) ADB. Perayu dijatuhkan hukuman gantung sampai mati.

Case(s) referred to:
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
Zulfikar Mustaffah v. PP [2001] 1 SLR 633 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A(1)
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), 39A(2), 39B(1)(a), (2)
Evidence Act 1950, s. 8

For the appellant - J Kuldeep Kumar & Athari Bahardin; M/s Hussaini & Co
For the respondent - Julia Ibrahim; DPP

[Appeal from High Court, Shah Alam; Criminal No: 45a-243-10-2012 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Mohtarudin Baki JCA:

[1] The appellant was charged with the following offence:

> Bahawa kamu pada 26 Mac 2012, lebih kurang jam 2.00 pagi, di Cawangan Pemeriksaan Penumpang 2 (CPP2), Balai Ketibaan Antarabangsa, Terminal Pengangkutan Tambang Murah (LCCT), Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, dalam negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu Ketamine seberat 3217 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] A total of nine witnesses were called by the prosecution to prove the charge against the appellant. The learned trial judge acquitted him at the end of the prosecution's case. The prosecution appealed against that decision and the Court of Appeal decided that the prosecution had proven a *prima facie* case against the appellant. He was then ordered to enter upon his defence.

[3] The appellant gave a sworn testimony during the defence case. At the end of the defence case, the trial judge decided that the appellant had successfully raised reasonable doubts on the prosecution's case for the charge of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA 1952). However, the learned trial judge decided that the prosecution had proven its case beyond reasonable doubt against the appellant and convicted him for an offence of possession of dangerous drugs under s. 12(2) punishable under s. 39A(2) of DDA 1952. The appellant was sentenced to 20 years of imprisonment from the date of arrest.

[4] Hence, the appellant appealed to this court in respect of the conviction and sentence. Meanwhile, the prosecution had also filed a cross-appeal against the amendment of the charge from s. 39B(1)(a) of the DDA 1952 to s. 12(2) of the same Act by the learned trial judge. We heard both the appeals together and after due consideration of the issues raised, we unanimously dismissed the appeal by the appellant and allowed the appeal by the prosecution. The appellant was then convicted under the original charge of s. 39B(1)(a) of DDA 1952 and sentenced to suffer death.

The Prosecution's Case

[5] On 26 March 2012 at about 2am, a customs officer, Mazlina binti Maarof (SP5) was on duty at the international arrival hall of LCCT. She instructed the appellant to scan his large green "Lycaro Polo" bag (P6) and small black colour bag. Upon scanning of those bags, a suspicious image appeared in the bag P6. The scan was done by customs officer Zamri bin Omar (SP6). SP6 instructed the appellant to a counter for inspection.

[6] The bag was locked with a small padlock and the appellant was asked to unlock the bag. Inside the bag was a black sling bag marked 'Air Oaking' and several types of clothes. The appellant was instructed to rescan the bag and the same image reappeared. SP6 instructed the appellant to put back his belongings in the bag and proceed to CPP2 office. Upon thorough inspection of the bag, a hidden compartment was found beneath the steel handlebars which were screwed to the bottom layer of the bag, containing a transparent plastic bag glued to it. The said plastic bag was examined and white crystal substance suspected to be dangerous drugs were found. Boarding pass (P58) and the passport (P66) of the appellant showed that he came to Kuala Lumpur from Bangalore, India by Air Asia Flight AK 1212.

[7] Thereafter, SP6 lodged a police report in relation to this case. He also prepared a search list (P25) and handed over all the exhibits to the investigation officer, Mohamad Yusaimi bin Mohd Yusoff (SP7). Norhaya binti Jaafar (SP4), a government chemist, analysed and confirmed that substances in P6 to be ketamine weighing 3,217g.

Findings Of Trial Judge

[8] At the close of prosecution case, the learned High Court Judge was satisfied that the prosecution had failed to establish a *prima facie* case against the appellant. It was agreed that the appellant had the control and custody of P6 as he was seen alone and was pulling the trolley bag from which the dangerous drug was found. P6 was locked with a small padlock and it was opened by the appellant himself with the key which he had kept in his shirt's pocket. Relying on that piece of evidence, the learned trial judge concluded that the appellant had direct and actual physical possession over the drugs found in P6.

[9] The trial judge referred to s. 2 of the DDA 1952 and made finding of trafficking of the said drugs which includes the act of carrying. It was also held that the quantity of the drugs indicated that it was not meant for the appellant's own consumption and the evidence irresistibly points to the appellant trafficking the drugs. In this respect, the learned High Court Judge held that the prosecution's evidence is overwhelming and the appellant knew the nature of the contents of plastic bag found in P6 even without having to rely on s. 37(d) of DDA 1952. The drugs were carefully concealed at the bottom layer of P6 and transported from Bangalore, India into Kuala Lumpur, Malaysia.

[10] However, His Lordship held that the prosecution did not succeed in proving the identity and nature of the impugned drugs. SP4, the chemist testified that after analysis of the exhibits, it was found that they were ketamine having a net weight of 3,217g. This finding was also stated in the chemist report, (P20). It was her evidence that the substances were homogenised to powdery form when she analysed them. According to SP4, homogenisation was done simultaneously and during the analysis.

[11] The learned trial judge held that this had amounted to a breach of globally accepted United Nations Guidelines which requires that the homogenisation process must be done before the analysation of the drugs and not during the analysis. On this ground alone, His Lordship decided that the prosecution had failed to prove the main ingredient of the charge, ie, the ketamine drugs weighing 3,217g. At the end of the prosecution case, it was found that they had failed to make out a *prima facie* case against the appellant. He was acquitted and discharged without his defence being called.

[12] Dissatisfied, the prosecution appealed against the said decision. The Court of Appeal then, allowed the appeal and remitted the case back to the High Court with the directive to call for his defence.

The Defence

[13] The appellant gave evidence on oath. He testified that on 25 March 2012 he took flight to Malaysia from Bangalore, India. He reached LCCT at about 1am on 26 March 2012. The appellant brought with him one black luggage bag and one black colour sling bag. His luggage bag was capable of carrying up to 10kg and was filled with sarees. Upon arrival at LCCT, the appellant was asked to scan his bags. After the scanning, he was detained for his bags to be inspected. The appellant informed that his luggage bag contained clothes, ie, sarees and dhotis. The appellant did not have the chance to look at the substances found in his bag during the inspection. He was also not informed by the officers about the dangerous drugs found in the bag prior to his arrest. Only later that year while he was in prison that the appellant knew that they found ketamine in his bag.

[14] During cross-examination, the appellant agreed that he was not forced by anyone to bring the bag into Malaysia. It was not his first trip to Malaysia and he was aware of the fact that trafficking in drugs is an offence here. The appellant testified in court that he had no knowledge of the existence of ketamine in his bag and that he came to Malaysia for a business trip whereby he received an order from Bangalore to purchase a LED TV in Malaysia. He had been doing this business since year 2010.

Findings Of The Trial Judge At The End Of Trial

[15] The trial judge found that the prosecution had failed to prove its case against the appellant beyond reasonable doubt on the original charge of trafficking. Instead, the court made a finding of custody or control of the drugs under s. 12(2) of the DDA and punishable under s. 39A(2) of the same Act. It was decided that only passive possession of the impugned drugs was proven against the appellant and a mere act of carrying does not amount to trafficking. His Lordship found merits in the argument by learned counsel for the appellant that the calm and normal behaviour of the appellant when he was apprehended showed his lack of knowledge of the said drugs recovered from the bag. As a result, the trial judge reduced the charge and accordingly found the appellant guilty and convicted him. He was sentenced to 20 years of imprisonment with effect from the date of his arrest on 26 March 2015. Thus this appeal by the appellant and the cross-appeal by the prosecution against the decision of the High Court Judge for reducing the charge from s. 39B(1)(a) of the DDA 1952 to s. 12(2) of the same act.

The Appeal

[16] Before us, learned counsel for the appellant had canvassed two pertinent grounds as below:

(i) The appellant had no knowledge of the impugned drugs found in P6;

(ii) The conduct of the appellant at the airport and the cooperation he gave throughout the investigation shows his innocence rather than guilt.

[17] The prosecution on the other hand submitted that the issue of knowledge has already been ventilated during the first appeal by the prosecution in Court of Appeal when the appellant was ordered to enter his defence for the original charge. The prosecution had also complained that the appellant's defence was nothing more than a bare denial.

Our Findings

Knowledge

[18] The defence case rested solely on the evidence of the appellant himself. It was never disputed by the appellant that he was in physical custody and control of the bag at the time of his arrest. The defence proceeded along the line of 'innocent carrier' to qualify the mental element that the appellant had no knowledge that he was carrying drugs in P6. He supported his argument by saying that the drugs were hidden from naked eye's view in the bag, thus would not alert the appellant to notice that there was something amiss. The learned trial judge had accepted the appellant's explanation and concluded as follows:

> melalui keterangan SP6, setelah beg P6 itu dikosongkan, terdapat satu kain pengalas berzip di dalam beg tersebut. Apabila zip dibuka, di dalamnya terdapat 2 batang besi merentasi beg dan di bawahnya terdapat satu lapik plastik hitam. Apabila dua batang besi dan pelapik hitam tersebut dikeluarkan, terdapat satu 'compartment' yang berwarna hitam disaluti kertas karbon dan papan 'plywood' bersama-sama satu bungkusan plastik lut sinar. Plastik lut sinar itu kemudiannya ditoreh dengan menggunakan pisau dan di dalamnya terdapat serbuk Kristal putih disyaki dadah. Ini jelas menunjukkan yang dadah-dadah tersebut tidak boleh dilihat dengan mata kasar. Tertuduh di dalam keterangannya menyatakan bahawa di sepanjang penggeledahan dilakukan, dia telah memberikan kerjasamanya dengan pihak kastam. Dia tidak cuba untuk melarikan diri. Melalui perlakuan sedemikian, dapat dibuat inferen yang tiadanya pengetahuan sebenar di pihak tertuduh tentang kewujudan dadah-dadah tersebut.

[19] Having considered the appellant's explanation at the end of defence case, the learned trial judge found that the appellant had raised a credible doubt in his mind as to whether the appellant had knowledge of the drugs.

We unanimously agreed that the trial judge had erred on this issue. Reference made to the case of *Zulfikar Mustaffah v. PP* [2001] 1 SLR 633 where it was held that:

> While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather the court appraise the entire facts of the case to see if the accused's claim to ignorance is credible.

[20] We also agree with the prosecution's submission that the issue of knowledge had already been dealt with when the Court of Appeal directed the appellant to enter upon his defence under the original charge for trafficking. In our assessment, looking at the evidence in totality, we disagree with the learned trial judge and found that the appellant could not exculpate his involvement in the trafficking of the seized drugs by saying that he had no knowledge or rather an 'innocent carrier' in this transaction.

[21] Contention of no knowledge of the hidden drugs that the appellant himself had not seen is inherently incredible as the amount of drugs involved in this case were rather big to claim innocence on the existence of the same. The weight of 3,217g can be felt and would raise a suspicion to any reasonable person who carries a bag even if it was concealed at any part of the bag. What Lord Diplock said in *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 in dealing with this kind of situation, which we reproduce below, is relevant:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible even if there were no statutory presumption such as contained in section 15 of the Drugs Act.

[22] We agree with the DPP's submission based on the case of *Teh Hock Leong v. PP* [2008] 4 CLJ 764, where Gopal Sri Ram JCA in dismissing the appeal held that:

> in the present instance the method to bring the drugs in question from Thailand to Malaysia was most cunningly employed to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example, an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge.

[23] Augustine Paul FCJ in *Parlan Dadeh v. PP* [2009] 1 CLJ 717 had this to say at p. 718 of the report:

> Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. The *ratio decidendi* of *Toh Su Kuan v. PP* is thus inconsistent with settled legal principles. In particular it conflicts with the correct statement of the law in the Court of Appeal case of *Wong Nam Loi v. PP* and the application of the principles in the judgment of this court in *Tunde Apatira & Ors v. PP*. The Court of Appeal was therefore justified in this case in disregarding *Toh Su Kuan v. PP* [2005] 3 CLJ 740 as the rule of precedent allows it to choose which of its past conflicting decisions it will follow. The submission advanced by the appellant was therefore without any merit.

[24] In our view, the appellant's defence was a bare denial without any plausible explanation as to how the drugs were present in the hidden compartment of P6. Nowhere in his evidence did he say that he was forced to bring the bag to Malaysia, or the bag was borrowed from someone else. He just testified that he had no idea as to the presence of the impugned drugs in his bag when he was arrested. We find that the statement of this sort does not carry much weight to support the defence case. In *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 at p. 250, Chong Siew Fai CJ (Sabah & Sarawak) had this to say:

> A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And, in considering whether there is a case to answer, the trial judge ought not take into account such statement as the basis for finding an order of acquittal and discharge.

[25] Even if we were to accept the appellant's defence of no knowledge of the drugs to be true, the principle of wilful blindness would operate against him. Therefore, the legal doctrine of "if a person deliberately 'shuts his eye' to the obvious because he 'doesn't want to know", he is taken to know' by Professor Glanville Williams applies to the appellant's omission to check the contents of P6 prior to his trip to Malaysia.

Conduct

[26] It was argued that the conduct of the appellant at the airport showed his innocence rather than guilt. The calm and cool demeanour of the appellant when he was apprehended showed that he didn't know about the drugs found in P6. Instead, he gave his full cooperation to the authority during the investigation. Obviously, heavy reliance was placed on this point by the learned trial judge in concluding that the appellant had no knowledge about the drugs in P6. The learned trial judge stated at pp. 10 and 11 of the appeal record (vol 1):

A … Tertuduh di dalam keterangannya menyatakan bahawa di sepanjang penggeledahan dilakukan, dia telah memberikan kerjasamanya dengan pihak kastam. Dia tidak cuba untuk melarikan diri. Melalui perlakuan sedemikian, dapat dibuat inferen yang tiadanya pengetahuan sebenar di pihak tertuduh tentang kewujudan dadah-dadah tersebut.

B …. Untuk mengaitkan Tertuduh mempunyai pengetahuan terhadap dadah-dadah tersebut, ia agak sukar. Tiada keterangan ditampilkan untuk menunjukkan wujudnya sebarang "overt act" di pihak Tertuduh. Malah SP6, Pegawai Serbuan dan SP9 selaku Pegawai Penyiasat menyatakan yang Tertuduh dilihat 'bersahaja' tanpa menunjukkan sifat takut atau panic. Malah tertuduh telah turut memberikan kerjasama.

C … Inferen yang boleh dibuat adalah tiadanya pengetahuan di pihak Tertuduh akan dadah-dadah yang tersembunyi tersebut. Dari fakta dan keterangan yang ditampilkan, apa yang jelas dan nyata ialah Tertuduh hanyalah mempunyai milikan yang pasif sahaja terhadap beg P6 yang mengandungi dadah-dadah tersebut. Tiada wujud keterangan untuk
D mengatakan yang dadah-dadah tersebut dibawa olehnya untuk diserah atau diedarkan kepada orang lain. Jelas, selain dari hanya memiliki secara pasif, tiada wujud apa-apa 'overt act' untuk mengaitkan Tertuduh ini dari segi melakukan pengedaran dadah berbahaya.

[27] With respect, we find this reasoning to be fundamentally flawed. We
E do not deny that this is a crucial and material evidence and relevant under s. 8 of the Evidence Act 1950. However, we are of the view that the evidence of conduct is not conclusive and should not be considered in isolation to show a person's guilt or innocence. This line of defence must be carefully considered in a more appropriate perspective. The appellant was surrounded by several customs officers when they examined his bag. Thus, the appellant
F being a foreigner had no choice but to follow their instructions and extend his cooperation to them.

[28] In any event, when the custody and control are established (which is not disputed by the appellant), knowledge is presumed by s. 37(d) of the
G DDA. With the reference to s. 2 of the DDA 1952, we find that the appellant's 'overt act' of trafficking in the dangerous drugs is proven. SP5 saw the appellant walking all alone at the airport while pulling the trolley bag (P6) in which the drugs were found. His boarding pass (P58) showed that he was transporting the drugs from Bangalore, India to Kuala Lumpur, Malaysia. The evidence is overwhelming and potent to prove that the
H appellant knew about the drugs in P6.

[29] At the close of the defence case, the learned trial judge found that knowledge had not been proved but because the drugs were in the appellant's custody and control, he was deemed to be in possession of the drugs. Therefore, he was convicted for the offence of possession under s. 12(2) of
I the DDA 1952. We, however are unable to agree with this finding and find it to be quite absurd.

[30] In order to determine whether the learned trial judge was right in law to have found the appellant was only guilty of the offence of possession and not of trafficking, due consideration ought to be given to all the material evidence at the conclusion of the trial as provided under s. 182A(1) of the Criminal Procedure Code. This provision requires the trial judge to not only consider the accused's explanation, but also to test it against the evidence established by the prosecution at the close of prosecution's case. In view of the above, we find it unbelievable that the appellant had a passive possession only of the offending exhibits found in P6 which had subsequently entitled him to be only punished under s. 12(2) of the DDA 1952 as decided by the learned High Court Judge.

Conclusion

[31] Having regard to the totality of the evidence and the circumstances of the case, it is our finding that the defence had failed to rebut the presumption of knowledge (s. 37(d) of the DDA 1952) on the balance of probability and to cast a reasonable doubt in the *prima facie* case that was established against him for the offence of trafficking. For the reasons aforesaid, we allowed the cross-appeal by the prosecution, set aside the conviction under s. 12(2) of the DDA 1952 and substituted it with an order that the appellant to be convicted for the trafficking charge under s. 39B(1)(a) of the same act. Thus, the appeal by the appellant against the conviction and sentence under the amended charge of s. 12(2) of the DDA 1952 is dismissed. We ordered him to be sentenced to death by hanging pursuant to s. 39B(2) of the DDA 1952.